Nos. 12,698-99

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF CHINA, a Corporation, *Appellant,* vs. WELLS FARGO BANK & UNION TRUST CO., a Banking Corporation, *Appellee.*	No. 12698
BANK OF CHINA, a Corporation, *Appellant,* vs. WELLS FARGO BANK & UNION TRUST CO., a Banking Corporation, *Appellee.*	No. 12699

Appellee's Opening Brief

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INTRODUCTION

Two cases are before this Honorable Court on appeal from decisions rendered by the District Court of the United States and from orders entered in accordance with those decisions. Both cases arose under similar circumstances. Attorneys purporting to act on behalf of Appellant Bank of China instituted these actions to recover moneys on

deposit with Wells Fargo Bank & Union Trust Co. After the cases were at issue attorneys for Appellant moved for summary judgment. Oral argument was had on this motion on December 19, 1949 (R. 327). At the close of the oral argument, District Court Judge Goodman reserved his ruling on the motion and set the cause for trial on December 29, 1949. Appellee held itself ready to proceed with the trial on that date, but at Appellant's request the Court continued the matter and fixed a new trial date of February 1, 1950.

On January 26, 1950 other attorneys also purporting to represent Bank of China, served on Appellee, in behalf of their clients (in their motion and hereinafter called Movants) notice of a motion to dismiss these actions or in the alternative for an order substituting themselves as attorneys for Bank of China. The basis of this alternative motion was a claimed lack of authority of those persons who engaged attorneys for Appellant to speak for the Bank of China.

This motion was argued before the District Court on January 30, 1950. On that day Judge Goodman entered his order that both the motion for summary judgment and the alternative motion for dismissal or substitution be submitted on briefs and took the matter off calendar for February 1. After presentation of briefs by the two groups of attorneys purporting to represent the Bank of China, the District Court rendered its opinion on July 18, 1950 (R. 96). An order in accordance with that opinion was signed and entered on August 7, 1950 (R. 106). The order did not, as Appellant states on page 7 of its Opening Brief, "finally" deny the Bank of China access to its demand deposit. On the contrary, the purpose and effect

of the Court's order was only to preserve the status quo until such time as the Court could conclusively determine which group of claimants had authority to act for the Bank of China.

The terms of the order entered by the District Court are as follows:

(1) The trial was continued sine die.

(2) Appellant's motion for summary judgment was denied without prejudice.

(3) Movants' motion for dismissal, or in the alternative for substitution of attorneys, was denied without prejudice.

(4) Appellee was permitted to deposit in the Registry of the Court, subject to its further order, the sum subject to the rival claims.

(5) Appellee was relieved of all liability for interest.

(6) Upon deposit of the aforesaid sum, Appellee was to be discharged from all liability in the premises, and all those persons purporting to act for the Bank of China were restrained from taking any proceedings to enforce their claims to the said sum against Appellee.

(7) Appellee's right to assert a claim against the aforesaid sum for costs and attorney's fees was reserved.

(8) Provision was made for notice to counsel of all further proceedings.

It is this order which Appellant asks the Court of Appeals to review. If Appellant now possesses conclusive proof of its authority to act for and as the Bank of China, a far more appropriate remedy than appeal would be an

application addressed to the District Court to have the case set for trial. The District Court of the United States was of the opinion that the facts before it on the submitted motions, and now before this Court, did not clearly establish Appellant's authority. It entered the order appealed from to protect the Bank of China, its stockholders and depositors, and postponed trial and decision until the story could be completed and all the facts could be presented (R. 105). It is this order of continuance which Appellant now asks the Court of Appeals to overturn.

STATEMENT OF THE CASE

Appellee believes that it is necessary to supplement Appellant's statement of the case in order to clarify its position and the reasons for its refusal of Appellant's demand.

Appellee admits that the sums claimed in the two complaints on file herein (Nos. 12,698, 12,699) were deposited with it in the names of the various branches of the Bank of China as set forth in the record. (No. 12,698, page 7; No. 12,699, page 15.) Appellee at all times has been ready to pay these deposits to the persons legally entitled thereto. Its only interest throughout this controversy has been to pay the deposits to such legally entitled persons and to secure a final acquittance from those authorized to give it.

Appellee became an involuntary stakeholder when conflicting demands were made for these deposits. On June 27, 1949, Appellee received a cable emanating from Shanghai, signed "Bank of China, Shanghai, China," and in the established test key for communication between Wells Fargo Bank & Union Trust Co. and the Bank of China (R. 67, 134). The cable stated that the Bank of China had been taken over by the Shanghai Military Control Commission

by order of the Chinese People's Liberation Army, East China Command; that the refugee officers of the Bank of China had been dismissed and could no longer represent the Bank; that their signatures and test key were void and that all communications from them were unauthorized; and instructed Appellee not to make payments from the Bank of China accounts except by specific order of the sender.

On June 30, 1949, Appellee received another cable from the same source to the effect that the purported Foreign Department of the Bank of China operating in Hong Kong was illegal, and transactions with it were null and void (R. 68, 138).

On October 7, 1949, Appellee received a demand from the Bank of China, Hong Kong for transfer of $600,000.00 to Bank of China, New York Agency. This demand was made in the name of the purported "Foreign Department, Head Office" of the Bank of China (R. 244), then purportedly located in Hong Kong (R. 261).

Thereafter, on November 9, 1949, further demand was made for this sum of $600,000 and for the additional sum of $26,860.07 by the filing of the complaint in action No. 12,698 (R. 3). On April 26, 1950, appellant made a demand for $171,724.57 by the filing of the complaint in action No. 12,699 (No. 12,699, R. 4, 15-16). Faced with these conflicting demands and the chaotic conditions in China, Appellee wanted greater proof of the authority of those demanding deposits standing in the names of the various branches of the Bank of China. Since proper proof of corporate authority was not forthcoming, Appellee suggested an action to recover the deposits so that a court could render a binding decision on the question of corporate authority and the right to receive the deposits.

SUMMARY OF ARGUMENT

Appellee's position is that of an involuntary stakeholder of a bank deposit, caught between two rival groups of claimants, each purporting to exercise the authority of the depositor. It has acted in good faith throughout these proceedings with the sole aim of paying the deposits to the persons legally entitled thereto. It refused Appellant's demands because of other claims to the same deposits and because of doubts as to Appellant's corporate authority. The complex nature of the legal questions involved and the confusing and chaotic factual background of the controversy over ownership of the deposits influenced Appellee to seek a court adjudication as to the validity of the rival claim. That was for Appellee the only way to protect itself from the possible risk of having to pay approximately $800,000.00 twice.

Appellee opposed a summary judgment because it wanted a full disclosure of the facts upon which Appellant's authority was based. Some of these facts relating to the internal affairs of the Bank of China would be available to Appellee only upon cross examination of Appellant's witnesses. Appellee was ready for an early trial of the issues involved, and stated to the Court that it was willing to proceed at the Court's and Appellant's convenience (R. 335).

The trial date was set for December 29, 1949, but was continued at *Appellant's* request. It was after this postponement that Movants attempted to enter the case. Appellee could not interplead at an earlier date because one of the two conflicting claimants was not within the jurisdiction of the court. Moreover, it is doubtful whether interpleader was available because of the peculiar nature of the controversy, viz., a dispute over the internal control

of a corporation. Appellee did all it could do under the circumstances. The law does not force a bank to choose between rival claimants to a deposit where there is a risk of being held twice for a deposit, in this instance of approximately $800,000.00.

Appellee contends that this appeal should be denied and that the order of the District Court should stand for the following reasons:

1. The order appealed from is not a final order and is not appealable.

2. Appellee should not be charged with interest for the use of the deposit.

3. Appellee should not be required to decide at its peril the bona fide factual dispute on the issue of corporate authority.

4. There is no clear cut decision which decides the precise question before this court.

5. Appellee should not be required to decide at its peril unanswered legal questions as to the effect of political recognition of a country.

6. An Appellate Court should not disturb the wide discretion of a trial judge in granting or refusing continuance of a trial.

ARGUMENT

I. Judge Goodman's Order Is in Essence Interlocutory, Merely Continues the Case for Trial and Is Not Appealable.

PERTINENT STATUTES

28 U.S.C. *Section 1291.* "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * *"

28 U.S.C. *Section 1292.* "The Courts of Appeals shall have jurisdiction of appeals from (1) Interlocutory orders

of the District Courts of the United States, * * * granting * * * injunctions * * *"

A. Continuance of the Trial Date Is Not an Appealable Order.

The main purpose of the order entered by the District Court was to preserve the status quo until such time as the facts could be presented to the court (R. 105). All other provisions of the order are incidental to the continuance sine die and must be reviewed in that light.

In *Bedgisoff v. Cushman,* 12 F.2d 667 (C.C.A. 9, 1926) the Appellate Court issued a writ of mandamus requiring a trial court to set a case for trial within a reasonable time not later than six months from the date of the mandate. The case was an action for breach of contract to remit a sum of money to a bank in Russia. The trial court had continued the case at the request of the defendant on the ground of defendant's inability to secure evidence essential to its defence because of the chaotic conditions in Russia and the lack of political recognition. The order of the trial court continued the matter until four months after recognition of Soviet Russia by the United States. After the lapse of five years plaintiff filed a petition for a writ of mandamus in the Circuit Court of Appeals for the Ninth Circuit. Defendant argued that plaintiff had no standing to obtain the writ because of his failure to appeal from the order granting the continuance. The Circuit Court of Appeals overruled defendant's argument on the ground that an order of continuance is not a final appealable order.

The continuance did not determine the case on its merits and did not deny the plaintiff its right to be heard. It merely affected the time of the hearing. It is to be noted that the Circuit Court of Appeals affirmatively recognized that a

trial court may continue a case for a reasonable time until evidence becomes available, but held that five years was sufficient time. No such period has elapsed in the case now before the court.

Appellant's remedy is not by appeal to this court. If it can now produce evidence sufficient to establish its corporate authority, it should seek an order from the trial court fixing a date for trial.

B. The Denial Without Prejudice of Appellant's Motion for Summary Judgment Is Not a Final Appealable Order.

The denial of a motion for summary judgment is not a decision on the merits. Even where a motion for a summary judgment is denied with prejudice, the denial still leaves the issues raised by the pleadings to be tried.

Marcus Breier Sons, Inc. v. Marvlo Fabrics, Inc., 173 F.2d 29 (C.A. 2, 1949);

Jones v. St. Paul Fire and Marine Ins. Co., 108 F.2d 123 (C.C.A. 5, 1939);

In re Finkelstein, 102 F.2d 688 (C.C.A. 2, 1939).

C. The Denial Without Prejudice of Movants' Motion for Dismissal or in the Alternative for Substitution of Attorneys Is Not a Final and Appealable Order.

Appellant is not aggrieved by that order. Appellant asks no relief against Movants. Its complaint is directed against Appellee alone. The order grants nothing to Movants. They remain in the same position which they occupied before their motion was filed. The order merely furthers the trial court's purpose in preserving the status quo pending a full hearing on the merits.

D. An Order Permitting the Deposit of Funds in Court Is Not a Final Order and Is Not Appealable.

Such an order merely brings the fund into court for preservation pending litigation and is interlocutory.

Louisiana National Bank v. Whitney, 121 U.S. 284, 7 Sup.Ct. 897 (1887);

Norris Safe and Lock Co. v. Manganese Steel Safe Co., 150 F. 577 (C.C.A. 9, 1907).

E. The Order Relieving Appellee from the Payment of Interest and Discharging It from Liability Is Incidental to the Order for Deposit and Is a Usual Concomitant of Such an Order.

It merely furthers the purpose of the court in preserving the status quo pending a full hearing on the merits and is incidental but not essential to the interlocutory order. It prevents loss to a stakeholder through the postponement of the trial.

F. The Order Restraining Appellants from Enforcing Against Appellee Any Claim to the Sum on Deposit in the Registry of the Court Is Not Essential to the Rest of the Order.

Even though the injunctive provisions of Judge Goodman's order be appealable under *28 U.S.C., Section 1292,* they are neverthless separable from the rest of the order, which is clearly interlocutory and not appealable. The incidental injunctive feature is only present to give further protection to the stakeholder after its deposit of funds in the Registry of the court and pending a trial on the merits.

G. Appellant Misrepresents the Effect of Judge Goodman's Order.

1. WHEN IT STATES THAT THE BANK OF CHINA IS "FINALLY DEPRIVED" OF ITS ASSETS.

The purpose and effect of the order is to *preserve* those assets for the Bank of China until such time as a court

can determine which group is the Bank of China. No one is finally deprived of any assets. The funds repose in the Registry of the District Court of the United States and will be paid out upon proof of authority to receive them.

Neither Movants nor the People's Government of China obtain anything from the order of the District Court. Movants are relegated to the same position they occupied before they made their motion. The District Court gives no recognition to any claim emanating from the People's Government of China. Neither Movants nor Appellant have proved their cases, and the effect of the order of the District Court is to maintain the status quo until one of them can do so.

2. WHEN IT COMPARES THE ORDER OF THE DISTRICT COURT TO "A DECLINATION OF JURISDICTION."

Cohens v. Virginia, 6 Wheat. 264, 404; 12 L.Ed. 257, 291 (1821) and other cases cited in the footnote on page 27 of Appellant's Opening Brief have no bearing on the order appealed from here. These cases refer to dismissal of a complaint without hearing when a trial court has jurisdiction.

The District Court did not decline to exercise its jurisdiction. Judge Goodman's order took jurisdiction of the case for hearing and *continued that jurisdiction* until sufficient evidence was available. There was an affirmance of jurisdiction, and there was no attempt to dismiss the case without exercising jurisdiction. By entering its order for a continuance the District Court clearly indicated that it will decide the case on the merits after a full hearing which will be held in the future on the motion of any proper party.

II. Appellee Should Not Be Charged with Interest for the Use of the Deposit.

As appears from the statement of facts of this case, Appellee did everything in its power to bring both claimants to the bank deposit before the court for an adjudication. It held itself available to proceed to trial and did all it could do under the circumstances, consistent with its duty to its own depositors and shareholders not to expose itself to a risk of double liability.

A. APPELLANT IS NOT ENTITLED TO ANY INTEREST ON THE DEPOSIT FOR THE PERIOD BEFORE AUGUST 14, 1950.

It appears in the record that Appellant's demand for $600,000.00 was made on Appellee on October 7, 1949 (R. 4, 6), its demand for $26,860.07 on November 9, 1949 (R. 4, 6), and its demand for $171,724.57 on April 26, 1950 (No. 12699, R. 4, 15-16). The rival claimants to the deposits (or undisputedly at least one of them) were in China, beyond the jurisdiction of courts of the United States. Appellee could not interplead the rival claimants, nor could it secure a judgment binding them. It acted as expeditiously as it could under the circumstances. A bank should not be forced to choose at its peril between two adverse claimants to a a deposit. Appellee took steps to deposit the sum in dispute in the Registry of the court within a reasonable time after both claimants had appeared in this action. It deposited $626,860.07 in the Registry of the District Court of the United States in Action No. 12698 on August 14, 1950 (R. 393), and on the same date deposited $171,724.57 in the Registry of the Court in Action No. 12699 (No. 12699, R. 34). Under such circumstances, Appellee should not be charged with interest which may have accrued before that date.

In *Illinois Banker's Life Assurance Co. v. Blood*, 69 F. Supp. 705 (N.D., Ill., E.D. 1947) the court relieved an insurance company of liability for interest for a much longer period under similar conditions. One of the adverse claimants to the proceeds of an insurance policy issued by the Assurance Company was in the military service and overseas for *four* years. During that time he was not subject to service in an interpleader action. The Assurance Company filed in interpleader and deposited the proceeds of the policy in court approximately three months after his return to the jurisdiction of the court. The United States District Court (N.D. Ill.) held that this was a reasonable time and relieved the Assurance Company of any liability for interest, either for the four year period or for the three months period. The court found that the involuntary stakeholder had acted with reasonable diligence in attempting to dispose of the insurance proceeds without subjecting itself to possible additional liability. The court obviously was influenced by the inability of the claimants to resolve their conflicting demands. Because of this conflict neither claimant was in a position to demand payment.

This case is directly in point and upholds the decision of the United States District Court which relieves Appellee of liability for interest.

B. APPELLEE CERTAINLY IS NOT LIABLE FOR INTEREST AFTER AUGUST 14, 1950, THE DATE OF DEPOSIT OF FUNDS IN THE REGISTRY OF THE DISTRICT COURT.

Where a sum or disputed fund which is the subject of litigation is deposited in court, interest is not recoverable on it during the time it remains so deposited. The stake-

holder derives no benefit from the use of the fund during that interval.

Fox v. Lofland, 98 F.2d 589, 593 (C.C.A. 3, 1938).

C. EVEN APART FROM THE PRINCIPLES STATED IN A AND B ABOVE, APPELLANT IS NOT ENTITLED TO INTEREST ON ANY OF THE DEPOSITS AFTER DECEMBER 27, 1949.

Appellee was ready to proceed to trial on December 29, 1949. On December 27, 1949 the trial date was continued *at Appellant's request.* At that time no rival claimant had attempted to enter the case. All further delays were occasioned by the entrance into the case on January 26, 1950 of Movants and by the controversy between Movants and Appellant. Those delays cannot be charged to Appellee.

A continuance requested by a party suspends his right to receive interest during the delay occasioned thereby.

Rasmussen v. National Popsicle Corp., 105 F.2d 759 (C.C.A. 9, 1939).

III. Appellee Should Not Be Required to Decide at Its Peril the Bona Fide Factual Dispute on the Issue of Corporate Authority.

Doubts as to Appellant's authority to act for and in the name of Bank of China would alone justify Appellee's action in refusing Appellant's demand until such time as proof of its authority was forthcoming. The record raises many questions bearing on this issue.

A. The record sheds doubt on the legality of the removal of the head office of the Bank of China from Shanghai, and hence on the validity of the demand for the $600,000.00 which came from Hong Kong and was purportedly made by the Bank of China, Head Office, Foreign Department.

B. The record sheds doubt on the validity of Hsi Te-Mou's appointment as general manager of the Bank of China and on his authority to direct institution of these suits, and hence also on the validity of the demands for the $626,860.07 and $171,724.57.

C. Conditions in China shed doubt on the continuing authority of Hsi Te-Mou as general manager of the Bank of China.

D. The record and conditions in China shed doubt on the scope and continuing validity of T. Y. Lee's Power of Attorney, by virtue of which he allegedly directed institution of these suits.

E. The record sheds doubt on the authority of the Directors of the Bank of China.

F. The record shows the absence of annual shareholders' meetings.

G. The record demonstrates the confusion in the administration of the internal affairs of the Bank of China.

When faced with these doubts the District Court decided to maintain the status quo until they could be resolved. When they can be resolved (and appropriate evidence is or should become available to resolve them) the District Court will undoubtedly set the case for trial. At that time a valid judgment can be rendered after a full hearing, fair to all the parties, and protecting Appellee from the risk of double liability.

Obviously the District Court did not wish to decide such important issues on affidavits or on a preliminary motion for summary judgment (R. 332). A motion for summary judgment should be granted only where all facts upon which the summary judgment is to be based are admitted or clearly established.

American Optical Company v. N. J. Optical Company, 58 F. Supp. 601, 606 (D.C.D. Mass. 1944);

Fleming v. Phipps, 35 F. Supp. 627, 630 (D.C.D. Md. 1940);

Clair v. Sears Roebuck, 34 F. Supp. 559 (D.C.W.D. Mo. W.D. 1940).

The record amply demonstrates that many of the facts upon which Appellant's right to recover is based are neither admitted nor clearly established.

In May, 1949, the People's Liberation Army overran Shanghai, and before the institution of these actions had also overrun Tientsin and Tsingtao. Officials and Directors of the Bank of China, as it had existed prior to May, 1949, scattered and fled. Two Directors disappeared; two remained in occupied China; others came to the United States; still others went to Formosa (R. 92-93, 103, 183). Prior to the occupation of Shanghai by the People's Liberation Army, the Head Office of the Bank of China was located in Shanghai (R. 304). That office was purportedly moved from Shanghai to Canton (R. 35, 195, 298), from Canton to Chungking (R. 36, 298), and finally from Chungking to Formosa (R. 298).

These were not normal circumstances. The hasty flights and forced removals furnished the background against which Appellee had to view the conflicting claims to the deposits. These circumstances widened and gave color to the doubts raised by the conflicting claims themselves.

Appellee wanted further proof of the authority of the groups demanding the deposits. For reasons beyond the knowledge of appellee, this proof was not forthcoming.

IV. There Is No Clear-Cut Decision Which Decides the Precise Question Before This Court.

Judge Goodman was correct when he stated:

> "Research reveals no case, with facts sufficiently similar to those of the present controversy, to be accepted as a controlling precedent." (R. 101)

Appellant places great reliance on *Guaranty Trust Co. v. U. S.*, 304 U.S. 126, 140, 58 S.Ct. 785, 792-793 (1938) and states that it would protect appellee from double liability. Appellee wishes it could regard that case with such certainty as a bar to further liability. Unfortunately it cannot. Recognition or non-recognition by the State Department is not the universal panacea for Appellee's troubles that Appellant would have the court believe.

In the *Guaranty Trust case* the United States was asserting a claim to a bank deposit made originally by the Imperial Russian government. The United States had been assigned the claim to that deposit by the Russian Soviet government under the terms of the Litvinov assignment, which accompanied recognition of the U.S.S.R. by the United States. The depositary's defense was based on the New York Statute of Limitations. The depositary had set off a claim of its own against the deposit and had so notified its depositor. The court held that the Statute of Limitations had run against the claim during the period of non-recognition of the U.S.S.R. Even though the Soviet government could not appear in the courts of the United States while it was unrecognized, the recognized (but deposed) Kerensky government could have brought suit. Since it did not, the depositor's right to challenge the set-off was lost.

The instant case does not present similar facts. Here, the depositor is a corporation and not a government; no Statute of Limitations is available to protect appellee from double liability; Appellee has not made any attempt at set-off, nor can it; there is no binding judgment upon which appellee can rely. The broad statements of the court in the *Guaranty Trust case* must be read in connection with the facts of the controversy.

At page 12 of its brief Appellant quotes the following sentence from the Supreme Court's decision in the *Guaranty Trust case:*

> "The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are."

The court was there referring to a transaction with a foreign government and a right barred by the Statute of Limitations. The Bank of China is a private corporation. Other language of the opinion adds to the impression that the court was confining its opinion to rights barred by Statute or by judgment.

Later cases lend credence to this interpretation of the court's language. In *Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank,* 177 Misc. 186, 30 N.Y.S. 2d 518, 527 (Sup. Ct. 1941), aff'd. 263 App. Div. 815, 32 N.Y.S. 2d 131 (1941), motion for leave to appeal den. 35 N.Y.S. 2d 717 (1942), the court, in discussing the *Guaranty Trust case,* stated:

> "Recognition does not alter the legal consequences of previous recognitions, and if plaintiff here recovers a *judgment* based upon our government's present

recognition of the Netherlands government now functioning in London, that *judgment* will be conclusive as against a claim based upon a later recognition of a successor government." (Emphasis added.)

Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (C.C.A. 2, 1940) passed on the validity of a purchase of silver by the Federal Reserve Bank from the then recognized Loyalist Government of Spain. Payment was made to the Loyalist Government, which had acquired the silver in its own territory by seizure from the Banco de Espana. After the Franco regime had been established in Spain the Banco de Espana, attempted to recover the silver or its value. The court found that the Federal Reserve Bank was protected by the completed transaction with a recognized regime. The court was dealing with the seizure of physical property located in territory under the de facto control of a recognized government. The facts of the instant case are not so simple as these. The "seizure" or "succession" to control of the Bank of China took place in territory *not* under the de facto control of the government upon whose recognition Appellant relies.

United States v. National City Bank of New York, 90 F. Supp. 448 (S.D. N.Y., 1950) was a suit brought by the United States, as assignee of the U.S.S.R., to recover funds deposited with defendant bank by the Russo-Asiatic Bank prior to the Soviet Revolution. The Soviet regime had nationalized the Russo-Asiatic Bank, and after recognition by the United States, had assigned its rights to the assets of that Bank to the United States. The court started with the proposition that recognition of the U.S.S.R gave *retroactive* validity to the Soviet nationalization decrees. It denied recovery by the United States *only because* of a

valid set-off by the defendant Bank. Defendant Bank held certain treasury notes of the Kerensky regime and the court ruled that the liability on those notes passed from the Kerensky government to the Soviets.

Wells Fargo Bank & Union Trust Co. has no set-off upon which it can rely to escape double liability.

California Banking Code, Section 952, cited by Appellant in the footnote on page 12 of its brief, does not determine the present controversy. This is not a case of two claimants to an account, but one of two groups claiming control of a corporate depositor. These groups are not "adverse claimants" to an account within the meaning of the statute. Compare *Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank,* 30 N.Y. S.2d 518, 525 (1941).

The leading case of *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York,* 253 N.Y. 23, 170 N.E. 479 (1930) cert. den. 282 U.S. 878, 51 S.Ct. 82 (1930) awarded a deposit made by a Russian bank chartered by the Imperial Russian government to certain emigré directors who had brought suit in the name of the Bank. They had filed the suit after the Soviet Revolution and during the period before recognition of the U.S.S.R. by the United States. The basis of the decision was that Soviet nationalization decrees are "not recognized as law in the United States." In view of the statement of the United States Supreme Court in the *Guaranty Trust case* that the *effect* of recognition or non-recognition is a *judicial* question, and more particularly of *United States v. Pink,* 315 U.S. 203, 62 Sup.Ct. 552 (1942), the basis of the Petrogradsky decision is somewhat questionable. The *Pink case* did give *retroactive* extraterritorial effect to a Soviet confiscation decree. See Note, 139 A.L.R. 1209, 1219.

The very words of Justice Cardozo (then sitting on the New York Court of Appeals) in the *Petrogradsky case* emphasize Appellee's dilemma. At page 485 he lightly dismissed the dangers of double liability with the words:

> "The chance of double payment is a common risk of life."

The risk of paying $800,000 twice is one which Appellee does not feel it should be called upon to take. At the very least it should not be charged with interest for a bona fide attempt in behalf of its depositors and stockholders to avoid such a risk.

The World War II cases cited by Appellant on page 17 *et seq.* of its opening brief are not decisive of the issues confronting Appellee.

Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank, 177 Misc. 186, 30 N.Y.S. 2d 518 (Sup. Ct. 1941), aff'd 263 App. Div. 815, 32 N.Y.S. 2d 131 (1941), motion for leave to appeal den. 35 N.Y.S. 2d 717 (1942), was an action brought by a Dutch corporation in exile against the Chase Bank to recover a deposit. The corporation and some of its officers made their way out of the Netherlands before the German occupation. The Germans meanwhile had occupied Holland and had taken over the Dutch assets of the corporation. Its German successors were claiming the same deposit. The distinction between the Koninklijke case and the instant matter lies in the fact that the Netherlands government was more foresighted than the Chinese Nationalist regime. It had passed a law allowing Dutch corporations to shift their corporate domicile from the Netherlands to other Dutch territory. Plaintiff was able to show *proper corporate action* in compliance with that law, and hence could establish its corporate au-

thority. Appellant in the instant case has made no such showing of authority.

The comparatively lesser risk of the "stakeholder" in the *Koninklijke case* is further emphasized by a New York Statute which must have given the Chase National Bank a great measure of reassurance. Chapter 150 of the Laws of 1941 amended Section 134 of the Banking Law of New York to provide, in general

> "that a bank or trust company need not recognize or give effect to claims, advices, statutes, rules or regulations emanating from territory dominated by authority not recognized by the United States" (30 N.Y.S. 2d at 527).

This strong declaration of the public policy of the State of New York does not aid Wells Fargo Bank & Union Trust Co. in this case. California has no similar statute.

Amstelbank N. V. v. Guaranty Trust Co., 177 Misc. 538, 31 N.Y.S. 2d 194 (1941) is a case with facts substantially identical to those before the court in the *Koninklijke case* and is of no greater help in resolving Appellee's dilemma.

In *A/S Merilaid & Co. v. Chase National Bank of the City of New York,* 189 Misc. 285, 71 N.Y.S. 2d 377 (1947) an Estonian corporation which had shifted its seat to Sweden prior to the incorporation of Estonia into the Soviet Union, was attempting to collect the New York bank account of the corporation. After its removal to Sweden, the corporation had been nationalized by the Estonian Soviet Socialist Republic and its Estonian assets had been seized. The court found that a meeting of the shareholders representing a majority of the stock occurred in 1945 in Sweden. That meeting transferred the seat of the corporation from Estonia to Stockholm, re-elected the former directors and

authorized them to withdraw the funds on deposit with defendant to be used in continuing the corporation's business. Corporate authority was thus established.

No such showing is made here. In fact, the record discloses no stockholders' meeting of the shareholders of the Bank of China since 1948 (R. 170, 237). Nor is there any evidence of an amendment to the Articles of Incorporation of the Bank of China to effect a change in the location of the corporate domicile.

Fred S. James Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928), was an action by a creditor of a Russian insurance company to set aside as fraudulent the transfer of assets by the Russian insurance company to a Connecticut insurance corporation which had been organized by the Russian company. At the time of the creation of the Connecticut corporation the Russian company was not insolvent, but a Soviet decree had provided for nationalization of all Russian insurance companies and the Soviet Government was taking over their assets. Obviously, the court was not faced with a problem of double liability on the part of a depositary, and the case does not decide the present controversy.

Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924), was a suit brought by an *individual* depositor against the National City Bank, a domestic corporation, to recover a deposit. The individual plaintiff had deposited dollars in the New York branch of the National City Bank, and that Bank had undertaken to pay plaintiff the equivalent of his deposit in rubles at its Petrograd branch. After this transaction the Soviet Government nationalized all banks in Russia and confiscated their deposit accounts. The

court held that this did not affect defendant's liability to plaintiff. The bank's liability was not to re-deliver earmarked assets which had been confiscated when physically present in Russia. It was a liability to pay a sum of money.

The *Sokoloff case* is not direct precedent for the instant controversy because the National City Bank was a domestic corporation and the Soviet confiscation decree must necessarily have been a mere confiscation of assets. Russia had no jurisdiction to dissolve the bank or to control its corporate affairs. The Bank of China is a Chinese corporation with its corporate domicile at Shanghai. If there was no effectual removal of its domicile from Shanghai, it remained subject to the governmental powers of the government which controlled Shanghai. An additional distinguishing factor is that the plaintiff in the *Sokoloff case* was an individual, so that no question of corporate authority was before the court.

Federal cases cited by Appellant do not appreciably clear the atmosphere in which Appellant would force Appellee to choose between rival claimants to control of the Bank of China.

The Maret, 145 F.2d 431 (C.C.A. 3, 1944), involved nationalization of a shipping vessel by the Soviet Government of Estonia after occupation of Estonia by the U.S.S.R. (not then recognized by the United States). The vessel was in the Virgin Islands at the time of its nationalization. The court held that the decrees of the unrecognized Estonian Government could not affect ownership of the vessel. The rationale of this decision was that the vessel was physically beyond the jurisdiction of the de facto government of Estonia. So far as the record in the present case indicates, the corporate domicile of the Bank of China was never

properly transferred from Shanghai, and Shanghai is under the de facto control of the unrecognized Chinese Government.

The Florida, 133 F.2d 719 (C.C.A. 5, 1943), Cert. den. 319 U.S. 774, 63 S.Ct. 1439 (1943), was a similar case where a vessel located in Cuba was nationalized at the time Estonia was overrun by the U.S.S.R. The Court stated that the record did not contain clear and convincing proof of ownership by a former owner still in occupied Estonia or by the Estonian State Steamship Co., a creature of the occupying Russian Government. The claim of title of the Estonian State Steamship Company was based upon a confiscation decree of the unrecognized government. The lack of clear evidence and the fact that the vessel was physicially beyond the jurisdiction of the de facto government influenced the court to reach the same decision as it had it *The Maret.*

These cases both involved a dispute over the ownership of a particular res. *The Maret* was concerned with the right to receive a fund deposited by the United States when it took over a ship. *The Florida* was a dispute over the ownership of the vessel itself. Obviously in these *in rem* proceedings there was no chance of double liability.

Latvian State Cargo and Passenger S. S. Line v. Clark, 80 Fed. Supp. 683 (D. D.C. 1948), was another case with substantially similar facts. It, too, involved a vessel beyond the physical jurisdiction of the regime purporting to nationalize it.

The last three cases discussed all involved claims asserted by a *new* Soviet-controlled corporation, and, hence, the question of authority to represent the original corpo-

rate owner was not involved. The Bank of China case presents an issue of authority to act for the original corporate depositor.

Appellant states at page 24 of its opening brief that an unrecognized foreign government cannot appear in any federal court. Throughout its brief Appellant treats its rival claimant as the People's Government of China. It overlooks the fact that the claim as made to Appellee was made by "Bank of China, Shanghai," and that the Movants' position before the District Court was that they, and not Appellant, had the authority to represent the Bank of China. This presents a question of corporate authority. The Bank of China is a corporation which was chartered by a recognized government. As such it has standing before this or any other federal court. The question before the court is, "Who is authorized to represent the Bank of China?" It was this question on which the District Court felt that there was not now such clear and convincing proof as to warrant a decision. For that reason it entered its order of continuance.

V. Appellee Should Not Be Required to Decide at Its Peril Unanswered Legal Questions as to the Effect of Political Recognition of a Country.

Appellant quotes *Guaranty Trust Co. v. U. S.*, 304 U.S. 126, 137, 58 S.Ct. 785, 791 (1938) (Opening Brief, page 22), as decisive of this case:

> "What government is to be regarded here as a representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."

Appellee, risking double liability for $800,000, cannot be as

easily satisfied. On further perusal of the *Guaranty Trust* decision it reads in the next sentence but one:

> "Its action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination, *although they are free to draw for themselves its legal consequences in litigations pending before them.*" (Emphasis added).

It is just such a judicial determination which Appellee wants—a determination of the rightful claimant to the deposit.

Appellee should not be required to answer the many perplexing questions of law at its peril. Among the complex legal questions awaiting decision are these:

A. THE RETROACTIVE EFFECT OF RECOGNITION.

U. S. v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942), holds that recognition gives effect to the decrees of the government recognized retroactive to the date of their enactment. This decision gives Appellee pause. While recognition of the People's Government of China seems highly unlikely today, it did not seem quite so improbable at the inception of this controversy. Who can say what the situation will be five years hence? The *Pink case,* involving recognition of Soviet Russia after fifteen years, demonstrates how world opinion changes. The eventual claimant of the funds deposited in the *Pink case* was the United States. It had become the assignee of the Russian Government. Who can say but that the eventual claimant of the Bank of China's funds may be the United States as an assignee of Chinese claims?

If perchance the United States should some day recognize the People's Government of China, that might give retroactive validity to the events of 1949. Would that impose a double liability on Appellee?

B. THE LEGAL CONSEQUENCES OF RECOGNITION OF NATIONALIST CHINA AND NON-RECOGNITION OF THE PEOPLE'S GOVERNMENT OF CHINA.

Appellant recognizes that United States courts do give some effect to the actions of a de facto government, even though it is not a recognized government. It necessarily recognizes this limited existence of a de facto government when it cites the cases listed at the bottom of page 14 of its Opening Brief.

It is settled law that United States courts will give effect to the acts of a de facto regime which is established and in effective control of an area, so far at least as the matters involved are within its territorial jurisdiction. This is particularly true where the issue before the court involves only nationals of the occupied territory.

The controversy now before the court is one over the control of a Chinese corporation, the Bank of China. It is a controversy between two groups of Chinese nationals. A domestic corporation, Wells Fargo Bank & Union Trust Co., is an involuntary stakeholder of assets belonging to the Chinese corporation. It is caught in the middle of the dispute.

Appellants claim that they are the only ones authorized to speak for the Bank of China. Movants take the same position, arguing that the corporate domicile of the Bank of China was and is Shanghai; that the corporation was never validly moved from China to Formosa; that the situs

of the corporate stock is the domicile of the corporation, viz. Shanghai; that both the corporation and its stock are located within territory subject to the de facto People's Government of China; and that Movants succeeded to ownership and control of the corporation by virtue of the acts of the de facto government of China.

The opinion of the District Court, cites several decisions giving limited effect to the acts of an unrecognized de facto government (R. 102). Noteworthy among these decisions are the following:

> *U. S. v. Insurance Companies,* 89 U.S. 99 (1874) (giving effect to incorporation by the legislature of a state in armed rebellion against the United States);
>
> *M. Salimoff & Co. v. Standard Oil Co.,* 262 N.Y. 220, 186 N.E. 679 (1933) (giving effect to Soviet confiscation of oil lands owned by Russian nationals and located in territory under the de facto control of the U.S.S.R.);
>
> *Banque de France v. Equitable Trust Co.,* 33 F.(2d) 202 (S.D. N.Y. 1929) (giving effect to Soviet confiscation of gold held within its territory for account of Banque de France by State Bank of Russian Empire).
>
> *The Denny,* 127 F.(2d) 404 (C.C.A. 3, 1942) (giving effect to nationalization decrees of the unrecognized Lithuanian Socialist Soviet Government).

In the *Banque de France case* the court was particularly concerned with protecting the only American national involved from double liability. It held that the Soviet confiscation of gold within its own territory would be recognized, so that the American national could rely upon the title of the Soviet State Bank and was not subject to suit to recover the gold instituted by the Banque de France.

> The effect of the decrees before the Court in *The Denny* was to nationalize certain Lithuanian associations. The court also recognized the authority of a certificate executed by a Lithuanian notary authenticating a power of attorney from two of the nationalized Lithuanian associations. The case was a dispute between Lithuanian citizens as to ownership of a vessel located in the United States at the time of the nationalization. While the same court later decided *The Maret,* supra, it did not overrule *The Denny,* but distinguished it. It emphasized the effect of the notary's authentication of the power of attorney running from the Lithuanian associations (145 F.(2d) at page 440, n. 38).

Such distinctions add to Appellee's confusion as to the effect of political recognition.

Also worthy of mention is *Russian Volunteer Fleet v. U. S.,* 282 U.S. 481, 51 S.Ct. 229 (1931). Appellant's attempt to distinguish this case as a claim against the United States (Opening Brief, pages 14-15) is an artificial one which gives Appellee little comfort. The fact remains that in spite of non-recognition of the U.S.S.R. by the United States, the Supreme Court recognized a claim of a Soviet corporation and the standing of that corporation to sue in the courts of the United States.

The Bank of China is a Chinese corporation. Movant asserts its claim through the corporate structure of the Bank of China. It is particularly on the issue of corporate authority that a hearing by the District Court should be had when sufficient evidence is available to determine that issue.

C. WHETHER APPELLEE WILL BE SUBJECTED TO A SECOND AND DOUBLE LIABILITY FOR THESE DEPOSITS.

Unless Movants are parties to this proceeding, and so barred from future action, they may later attempt to prove their corporate authority and to collect from Appellee for a second time.

Several cases raise grave doubts as to the authority of refugee directors to sue on the claim of a nationalized corporation or on the claim of a corporation with its domicile in occupied territory. If it can subsequently be shown that the suit by the refugee directors was unauthorized, there may be a second recovery against the stakeholder, where the rival claimants to corporate authority are not parties to the first proceeding.

In *Russian Reinsurance Co. v. Stoddard,* 240 N.Y. 149, 147 N.E. 703 (1925), rearg't den. 148 N.E. 757, the court dismissed an action brought by emigré directors in the name of a Russian insurance corporation to recover money and securities deposited by the corporation with the Bankers Trust Company. The trust company held the money and securities as trustee to protect policy holders and creditors in the United States. Before the suit was begun the Russian corporation had been nationalized by decree of the unrecognized Soviet Government and had been prohibited from holding directors' and stockholders' meetings.

The Bankers Trust Co. claimed no interest in the money and securities except as trustee or depositary. It resisted plaintiffs' claim on the ground that plaintiffs failed to establish ownership or right of possession to the exclusion of others who might demand the property thereafter, and on the ground that the corporation no longer existed, or

in the alternative, that those emigré directors who made the demand and authorized the suit no longer represented the corporation. It further urged that the court should not assume jurisdiction of the action, because a judgment would not bind other parties who were not before the court and who might thereafter be able to establish a valid claim.

In view of its doubts as to the continued existence of the corporation and as to the authority of those persons who had instituted the action to speak for the corporation, and because of the chance that defendant might be exposed to a second liability for the same funds, the court refused jurisdiction. The court stated that the corporation was deprived of no substantial right or benefit by its refusal to take jurisdiction

> "* * * until the time comes when a government which we recognize rules the country of plaintiff's corporate domicile, or at least until the plaintiff corporation is able to re-establish its existence in that domicile, and the machinery provided by its charter for the management of its affairs is again functioning." (147 N.E. at 709.)

After recognition, the United States courts could pass on the justice of any Soviet claim based on confiscation.

This case has never been overruled, although Judge Cardozo attempted to distinguish it in the *Petrogradsky case,* supra. It is based on reasoning directly opposed to Cardozo's reasoning in the *Petrogradsky case,* and adds to Appellee's perplexities in its present dilemma. The *Petrogradsky* decision found that plaintiff's corporate personality continued and that those who had instituted the suit had authority to act for the plaintiff corporation. The opin-

ion in the *Russian Reinsurance Company case,* on different facts, expressed doubts both as to the continued corporate existence of the plaintiff and as to the authority of those persons who had instituted the action. It found that the law of the corporation's domicile controlled on both of these issues, in spite of the fact that the territory of the domicile was under the control of an unrecognized government.

The record now before this Honorable Court raises real doubts as to corporate authority and the facts bear much similarity to those before the court in the *Russian Reinsurance case.*

Steingut v. Guaranty Trust Co., 161 F.2d 571 (C.C.A. 2, 1947), was decided after the United States Supreme Court had handed down its decisions in the *Guaranty Trust Co. case,* supra, and in *U. S. v. Pink,* supra; it passed on the right of the New York State Receiver of the Russo-Asiatic Bank to a demand deposit made by the Russo-Asiatic Bank before it was nationalized by the Soviet Government of Russia. The United States claimed the deposit as assignee of the Soviet Government under the Litvinov assignment. The case arose after recognition of the U.S.S.R. by the United States. In the course of its opinion the court stated that a 1918 demand made on the Guaranty Trust Co. by refugee directors of the Russo-Asiatic Bank was an ineffective demand. It did not start the running of interest in favor of the assignee of the Russian Government. This statement reflects doubt on the authority of refugee directors to sue in the name of a corporation domiciled in occupied territory.

D. LEGAL EFFECT OF DRASTIC CHANGES IN CHINA ON CONTINUED VALIDITY OF T. Y. LEE'S POWER OF ATTORNEY AND ON AUTHORITY OF REFUGEE DIRECTORS AND MANAGING OFFICERS OF THE BANK OF CHINA.

1. The institution of the present actions was authorized by T. Y. Lee and Hsi Te-Mou. T. Y. Lee's authority derives from his position as manager of the New York branch of the Bank of China and from a power of attorney from the Bank of China.

The court in *Andre v. Beha,* 211 App. Div. 380, 208 N.Y.S. 65, 81 (1925), expressed doubt as to the effect of a power of attorney given to a general manager of a Russian corporation before that corporation was nationalized by the Russian Government and before the Soviet Revolution. It stated that the power of attorney referred to powers at the time it was issued five years before and under different conditions, before dissolution of the corporation by the Soviet Government and confiscation of its property.

2. *Russian Reinsurance Co. v. Stoddard,* supra, recites facts very similar to those in the present record. The corporation was prevented from conducting its business at its corporate domicile. Its property had been sequestered and its business nationalized. No meetings of the stockholders had been held for some time. Meetings of directors had been held elsewhere than at the corporate seat, in spite of charter provisions as to the location of the corporate domicile. The directors were acting without the customary checks and limits furnished by shareholders' meetings and provided for in the corporate charter. The court expressed its doubts as to the continuance of the agency of the refugee

directors to act for the corporation and even as to the continued corporate existence of the plaintiff.

VI. An Appellate Court Should Not Disturb the Wide Discretion of a Trial Judge in Granting and Refusing Continuances.

When and if appellant feels it can satisfactorily prove its case, its remedy is to ask the District Court to set the case for trial. A trial judge has a wide discretion to control the time of hearing a case and to postpone a trial on the merits where the question and the just rights of the parties require postponement. A judge may grant a continuance on his own motion.

In re Howard, 130 F.2d 534 (C.C.A. 5, 1942); 7 Cyc. Fed. Proc. 352.

Only if the refusal of the trial court is arbitrary or if the continuance is unreasonably long can appellant seek the aid of this court. Even then its remedy is by way of a petition for a writ of mandate and not by appeal.

Bedgisoff v. Cushman, 12 F.2d 667 (C.C.A. 9, 1926).

CONCLUSION

As is evident from the content of this brief, Appellee Wells Fargo Bank is not personally interested in the fund heretofore deposited with it and now in the registry of the court. It is, however, interested that the fund be paid to the proper person and that it be released of liability to any other person upon such payment. It is, of course, also interested that it not suffer any penalty of interest under the circumstances of this case where it acted promptly and in good faith in an effort to have determined the true owner-

ship of the fund. Any delays which occurred were caused by others than the Appellee bank.

As previously stated, Appellee believes that the District Court is the proper tribunal to determine ownership of the fund, and therefore that the judgment in this matter should be affirmed and Appellant left to its remedies before that Court.

Respectfully submitted,

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